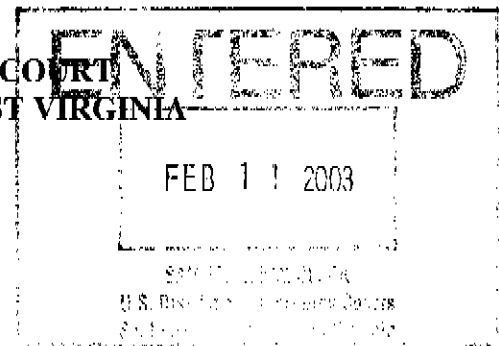


IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: SERZONE
PRODUCTS LIABILITY LITIGATION



MDL NO. 1477

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER #5

Pending before the court is the Plaintiffs' Steering Committee's (PSC) motion to establish an equitable reserve for future allocation of common benefit fees and costs. The court **GRANTS** the motion as set out herein.

1. This order is intended to provide for the fair and equitable sharing among plaintiffs of the costs of services performed and expenses incurred by attorneys acting for the common benefit of plaintiffs in this matter, MDL-1477. If and when the need arises, Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel shall establish an interest-bearing account or accounts (Cost and Fees Accounts) to receive and disburse a certain percentage of any and all payments, which may be made from time to time, by the defendant to a plaintiff or plaintiffs in fulfillment of obligations to settle claims of a plaintiff or plaintiffs, as well as to satisfy any judgments that may result. (All such payments are referred to as "Claim Payments.") The Cost and Fees Accounts need not be established unless and until the defendant makes any Claim Payments, but if any Claim Payment is made by the

defendant, the Cost and Fees Accounts shall be established. The funds sequestered in the Cost and Fees Accounts shall be used to provide for reimbursement of costs and payment of attorneys' fees to the PSC and other attorneys who have been authorized by the PSC, pursuant to Pretrial Order #2, to perform work for the common benefit of plaintiffs in MDL-1477, subject to a proper showing in the future. (Attorneys authorized by the PSC to perform work for the common benefit of plaintiffs in MDL-1477 are referred to as "Common Benefit Attorneys.")

2. No party or attorney, including the Common Benefit Attorneys, has any individual right or entitlement to any specific sum deposited in the Cost and Fees Accounts as payment of counsel fees, reimbursement of litigation expenses, or for any other purpose. The funds in the Cost and Fees Accounts are held subject to the discretion of the court. This order is merely intended to develop a mechanism for the creation of a fund from which the amount of fees and costs to which the Common Benefit Attorneys may be ultimately entitled may be awarded and paid with reliability. These funds will not constitute the separate property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed to a specific person as provided by order of this court.

3. Before making any Claim Payment to a plaintiff in a federal action that has been subject to coordinated pretrial proceedings in MDL-1477, the defendant shall deduct from such payments an amount equal to nine percent (9%) of the aggregate amount being paid and any amounts to be paid to the plaintiff in the future, and shall pay such sum as hereinafter provided for deposit into the MDL-1477 Fee and Costs Accounts. Seven percent (7%) shall be deemed fees to be subtracted from the attorneys' fees portions of individual fee contracts, and two percent (2%) shall be deemed costs to be subtracted from the client portions of individual fee contracts. In measuring

the gross amount due or to become due to any plaintiff as Claim Payments, the defendant shall include the present value of any fixed and certain payments to be made in the future and the respective individual plaintiff's counsel shall verify that plaintiff's counsel used the same present value calculation to measure both the amount due to such plaintiff's counsel under the applicable contingency contract, and the amount due to the MDL-1477 Fee and Cost Accounts.

4. The requirements of paragraph 3 shall apply regardless of whether a plaintiff's case is disposed of during the time it is on the docket of the transferee court, or following remand or transfer from the transferee court to another federal district court for trial, or transfer to other district courts in accordance with 28 U.S.C. § 1404, or other provisions of law. The obligation shall follow the case to its final disposition in any United States court, including a court having jurisdiction in bankruptcy or disposition on appeal.

5. Defendant shall have the primary responsibility for withholding nine percent (9%) of the Claim Payments and tendering such sums to the MDL-1477 Fee and Costs Accounts. If, however, defendant fails to do so, in addition to the court's power generally, including the exercise of its powers to compel payment by defendant in compliance with this order, the court, under appropriate circumstances, may seek such payment from the plaintiff and/or his or her counsel under terms that are just and equitable.

6. If and when the Cost and Fees Account is created by Plaintiffs' Liaison Counsel and Defendant's Liaison Counsel, both Liaison Counsel shall agree upon and designate an escrow agent to manage the accounts. All Claim Payments shall be made by the defendant to the escrow agent. Payment to the escrow agent shall fully discharge the defendant's obligation under this order. The payments to be made to the accounts shall not be disclosed by the escrow agent except upon written

order of this court. The purpose of maintaining confidentiality is to protect the defendants' legitimate concerns regarding disclosure of the amounts that it deposits into the escrow fund, as knowledge of these amounts would enable calculation of the total sums, if any, paid by the defendant as Claim Payments in this matter. From time to time, the escrow agent shall report to the court the sums that are deposited in the accounts, together with the information supplied to the agent to determine if the amount deposited is the amount required to be paid under this order. The escrow agent shall confer with the defendant and the court to determine the appropriate form, to be completed by the defendant and to accompany any payment made to the escrow agent, to allow the escrow agent to verify the accuracy of any payment made.

7. Upon proper showing and by order of this court, payments may be made from the Cost and Fees Accounts to Common Benefit Attorneys who provide services or incur expenses for the common benefit of plaintiffs in MDL-1477, in addition to their own client or clients. For example, payment from the Cost and Fees Account may be allowed for services rendered and expenses incurred in the management and review of documents from the defendant or in conducting depositions, insofar as these activities are related to all or large groups of plaintiffs. In contrast, payment from the Cost and Fees Account will not be allowed for services and expenses primarily related to a particular case, such as the deposition of an individual plaintiffs' treating physician. The escrow agent shall make payments from the Cost and Fees Account only as directed by future order of this court, and all determinations of entitlement to payments from the Cost and Fees Account shall be made at the discretion of the court, based on the relevant facts and the appropriate and controlling law. In making an award of counsel fees to the Common Benefit Attorneys, and in apportioning any fee award among those attorneys, appropriate consideration will be given to the experience, talent

and contribution made by each Common Benefit Attorney who seeks to recover counsel fees from the MDL-1477 Fee and Costs Accounts. Provided, however, that the court will only consider compensation for those services which were authorized by lead counsel and the PSC pursuant to Pretrial Order #2.

8. Any sum ordered to be paid by the court pursuant to this order as an award of counsel fees shall be deducted from the total amount of counsel fees payable to individual plaintiffs' counsel. The Common Benefit Attorneys' portion shall not diminish the portion of the recovery that any plaintiff would have been entitled to receive had there been no participation by the Common Benefit Attorneys. Any sum ordered to be paid by the court pursuant to this order as reimbursement for out-of-pocket costs shall be prorated among the plaintiffs whose Claim Payments were deposited, in part, in the MDL-1477 Fee and Cost Accounts.

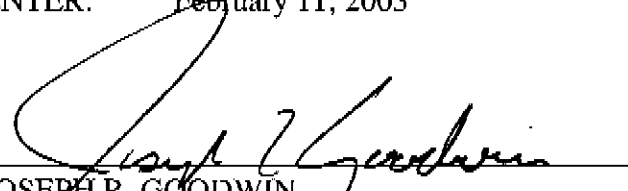
9. Nothing in this order will prevent any attorney from applying for and receiving an award of counsel fees and reimbursement of costs pursuant to governing law in a greater percentage amount than provided for herein, in the event that there is a recovery in any action which may be certified as a class action under *Federal Rule of Civil Procedure 23*.

10. At such time as the MDL-1477 Fee and Cost Accounts contain balances that are not necessary to be retained for the payment of fees and costs, the court will, subject to applicable provisions of law and following a hearing (if necessary), make refunds on an equitable basis, or, if such balances are of small amounts, enter such orders concerning the disposition of such funds as are appropriate under the law.

11. The court reserves the power to modify the terms of this order.

The court **DIRECTS** the Clerk to send a copy of this Order to Defendant's Liaison Counsel
and Plaintiffs' Liaison Counsel.

ENTER: February 11, 2003



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE